UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

PRIME HEALTHCARE SERVICES – ENCINO HOSPITAL, LLC d/b/a ENCINO HOSPITAL MEDICAL CENTER

and **Case No. 31-CA-131701**
31-CA-140827

SEIU UNITED HEALTHCARE WORKERS – WEST

PRIME HEALTHCARE SERVICES – GARDEN GROVE, LLC d/b/a GARDEN GROVE HOSPITAL AND MEDICAL CENTER

and **Case No. 21-CA-131714**
31-CA-140844

SEIU UNITED HEALTHCARE WORKERS – WEST

PRIME HEALTHCARE CENTINELA, LLC d/b/a CENTINELA HOSPITAL MEDICAL CENTER

and **Case No. 31-CA-131703**
31-CA-141016

SEIU UNITED HEALTHCARE WORKERS – WEST

RESPONDENTS' MOTION FOR RECONSIDERATION

Prime Healthcare Services — Encino, LLC d/b/a Encino Hospital Medical Center ("Encino"), Prime Healthcare Centinela, LLC d/b/a Centinela Hospital Medical Center ("Centinela"), and Prime Healthcare Services — Garden Grove, LLC d/b/a Garden Grove Hospital & Medical Center ("Garden Grove") (collectively, "Respondents") pursuant to NLRB Rules and Regulations Section 102.31 hereby requests that the Administrative Law Judge

("ALJ") reconsider the August 31, 2015 Order Granting Charging Party's Petition to Revoke Subpoena Duces Tecum B-1-M9QMXJ ("Order"), attached hereto as Exhibit A.

The ALJ should reconsider the Order because it denies fundamental due process to Respondents. The Order was issued one business day after the filing of Charging Party SEIU-UHW-West's (the "Charging Party" or the "Union") 45-page Petition to Revoke and before Respondents had an opportunity to file an opposition. As articulated below, the Charging Party's arguments for revocation of the Subpoena[1] are unsupported boilerplate at best and at their worst, utterly frivolous and disingenuous. The Order denied due process to Respondents by not allowing them to address the Charging Party's meritless grounds for revocation.

By granting the Union's Petition to Revoke Respondents' Subpoena in full, the ALJ's Order also denies to Respondents the opportunity to prepare and present its defense. Despite requesting documents and materials specifically relating to agreements specifically referred to in the Complaint, the ALJ has denied the requests as "irrelevant" and "not germane." Despite the narrowly tailored nature of the Subpoena Requests, the ALJ found them to be overbroad. The ALJ also revoked the Subpoena because of the mere potential that the requests may seek collective bargaining strategy, even though half of the requests were for correspondence and notes of conversations with external parties. The ALJ's revocation of Respondents' Subpoena on these grounds is in error.

Contrary to the Order, the Union's Petition to Revoke is entirely meritless. The Charging Party's view seems to be that, because it views this matter as "straight forward," that it need not respond to the Respondents' lawful and relevant Subpoena. This contention is patently ridiculous. The Union is obligated under Board law to comply with the Respondents' lawfully propounded and relevant Subpoena requests. The Union's theory of the case does not alter or

[1] Subpoena *duces tecum* No. B-1-M9QMXJ ("Subpoena") attached hereto as Exhibit B.

minimize these obligations.

There can be no question that these requests seek relevant information. The Union has alleged that, after a course of negotiations with the Union, Respondents agreed to collective bargaining agreements at the three Respondent Hospitals, but failed to execute those agreements. Respondents have denied these allegations. As it must, the Union acknowledges that the negotiations for agreements at the three Hospitals were a part of a more global set of negotiations between the Union and Prime Healthcare Services, the company that owns the three Hospitals. It paradoxically argues however that these global negotiations are not relevant to the issue of whether agreements were reached at those hospitals.

The global settlement negotiations between the Union and Prime provide the essential context for the Union's claims and the Respondents' defenses. Basic contract law requires inquiry into the intent of the parties, as informed by the facts known by the parties. To that end, Respondents issued a lawful and narrowly tailored set of subpoena requests to the Charging Party, entirely focused on the very contract negotiations that the Charging Party alleges resulted in an agreement between the parties. These negotiations clearly have central relevance to the issue of whether or not the parties reached an agreement.

Rather than abiding by their lawful obligations to respond to Respondents' Subpoena, the Union has instead chosen to attempt to bury the Subpoena under an avalanche of repetitive, frivolous and boilerplate objections. Among the Union's meritless objections are ludicrous contentions such as the Union's claim some of the documents requested are somehow shielded from disclosure by the deliberative process privilege, a privilege applicable only to governmental officials, or by a mediation privilege, a privilege that only applies to the mediator and not parties to the mediation The Board should reconsider its Order and overrule all of the Union's transparently baseless objections and order the Changing Party to comply with the Subpoena.

I. BACKGROUND

On August 21, 2015, Respondents served the Subpoena upon the Charging Party. On Friday, August 28, 2015 at 4:38 p.m., the Charging Party sent a copy of its 45-page Petition to Revoke by facsimile transmission to the law firm representing Respondents, but neglected to serve the counsel who will be representing Respondents at the hearing.[2] On Monday, August 31, 2015 at 4:44 p.m., the ALJ served the Order Granting Charging Party's Petition to Revoke Subpoena Duces Tecum B-1-M9QMXJ.

The Order revoked Respondents' Subpoena in full. The Order revoked Subpoena Requests 1 and 2 which seek notes and correspondence concerning the Global Settlement Negotiations because the ALJ found that those requests were "overbroad, not narrowly tailored to request relevant information and specifically seek the Union's internal deliberations and bargaining strategies." Order at 2.

The Order revoked Requests 3 and 4, which sought documents, correspondence, notes and records of telephone conversations between the Union and outside parties concerning the Global Settlement Negotiations because "I do not see how these documents are relevant to the issue of whether Respondents and the Union reached a written agreement on the terms of conditions of employment of a master collective bargaining agreement regarding Respondents' employees at its Encino, Garden Grove and Centinela locations." Order at 3. The ALJ further found that the requests were overbroad and encompass documents that relate to the Union's collective bargaining strategy. *Id*.

The Order revoked Requests 5 through 8 which requests notes, agreements, and correspondence concerning both the Global Settlement Agreement Negotiations and the

[2] The Charging Party faxed the subpoena to Colleen Hanrahan and David Durham, but not to John Fitzsimmons who has entered his appearance in this matter and who is trial counsel for Respondents.

negotiations of certain of the agreements that were a part of the Global Settlement Agreement Negotiations. The ALJ ruled that these documents were not relevant to the issues in this case, were equally available to Respondents and call for internal Union collective bargaining strategy documents. *Id*.

The Order revoked Requests 9-12 which seek correspondence, notes of telephone conversations, and agreements relating to the negotiations of certain of the agreements that were a part of the Global Settlement Negotiations. The ALJ found that the requests were overbroad, irrelevant, and encompass documents that relate to the Union's collective bargaining strategy. Order at 3-4.

II. ARGUMENT

A. The ALJ Should Reconsider the Erroneous Order

The ALJ's Order is in error and deprives Respondents of due process in this proceeding. First, the ALJ ruled without providing Respondents an opportunity to oppose the Petition to Revoke. Second, the ALJ's ruling denies Respondents the opportunity to gather evidence to present its defense. Therefore, the ALJ should reconsider the Order and deny the Petition to Revoke.

The Division of Judges served the ALJ's Order only one business day after the Charging Party served the Petition to Revoke. Respondents were in the process of preparing their response to the Union's 45-page Petition, which was not even served upon Respondents' trial Counsel, who works in a different office location than the other Counsel for Respondents. The ALJ erred by arbitrarily deciding the Union's Petition to Revoke prior to allowing Respondents a reasonable opportunity to respond.

The ALJ's Order is also in error because it revokes the Subpoena in full on the grounds that it seeks material irrelevant to the issues of this case. In so doing the ALJ only considered

relevance as this matter as narrowly framed by the Union. To the contrary, the documents and materials requested by the Subpoena have unquestionable relevance to this case. Indeed the Complaint in this matter expressly alleges that the Respondents had reached agreement on the terms and conditions of employment at the three hospitals that would be incorporated into a "master collective bargaining agreement." Complaint ¶ 17(a). Respondents' requests- for documents, copies of agreements, and correspondence concerning the very negotiations that led to these purported agreements are highly relevant to understanding the knowledge and intent of the parties, the context of those agreements, and the very terms and conditions of employment negotiated between the parties. For the ALJ to limit the universe of relevant materials to those exchanged across the table between the parties deprives Respondents of materials essential for their defense and is clear error warranting reconsideration.

Further, it is also error for the ALJ to revoke the Subpoena requests in their entirety simply because the requests may encompass some undefined and unspecified documents allegedly relating to the Union's internal bargaining strategies. This is clearly erroneous, especially when half of the Subpoena Requests expressly only seek correspondence and notes of telephone conversations with parties external to the Union. *See* Requests 3, 4, 6, 9, 10, 12. There can be no such privilege claimed for these externally exchanged documents.

B. <u>A Broad Discovery Standard Applies to a NLRB Subpoena</u>

When evaluating a petition to revoke a subpoena, the administrative law judge or the Board "shall revoke [a] subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid." N.L.R.B. Rules & Regulations, § 102.31(b). As Section 10(b) of the National Labor Relations Act

provides that proceedings before the Board shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States, the Board has held that the Federal Rules of Civil Procedure provide useful guidance with regard to the scope of discovery. *Brink's Inc.*, 281 N.L.R.B. 468, 469 (1986).

Accordingly, the Board has applied the broad discovery standard from Rule 26(b) of the Federal Rules of Civil Procedure when analyzing whether to grant a petition to revoke a subpoena. *See CNN America, Inc.*, 352 N.L.R.B. 675, n.6 (2008) (applying the discovery standard from Rule 26 to evaluate a petition to revoke a subpoena); *see also American Benefit Corp.,* 354 N.L.R.B. No. 129, n.19 (2010) (The "'broad discovery-type standard' followed by the Board" is based upon Rule 26(b)(1) of the Federal Rules of Civil Procedure). Under the Federal Rules of Civil Procedure:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1); *see also Brink's, Inc.*, 281 N.L.R.B. at 469 ("[i]t is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

C. The Subpoena Requests are Indisputably Relevant to this Matter

The Union, having brought this charge, now wants to short circuit the presentation of the defense Respondents are entitled to present. The Union claims that the entire universe of material relevant to the resolution of this matter is limited to a small handful of emails sent at the very end of a multi-faceted course of negotiations and that everything beyond this is irrelevant. As the Union as much as acknowledges in its Petition to Revoke, this contention is belied by actual nature of the negotiations between the parties concerning these agreements.

Negotiations for collective bargaining agreements at the three Respondent hospitals were a part of a larger course of negotiations between the parties. The Union was fully aware that the negotiations for the Centinela, Encino, and Garden Grove collective bargaining agreements was inextricably intertwined with these larger, global settlement negotiations. These contract negotiations involved not only the collective bargaining agreements for three Hospitals, General Settlement Agreement and Memorandum of Understanding that would govern the relationship between Prime and the Union; an Elections Procedure Agreement; and a framework for a collective bargaining agreement for workers at hospitals in the Daughters of Charity Health System ("DCHS") which Prime had agreed to purchase subject to the approval of the Attorney General for the State of California. .

Each and every one of Respondents' Subpoena requests are explicitly related to these global settlement negotiations or to the negotiations for the individual agreements that were components of the global settlement negotiations. The Subpoena Requests seek:

1. Any documents … concerning the Global Settlement Agreement Negotiations.

2. Correspondence … concerning the Global Settlement Agreement Negotiations.

3. Correspondence [with external parties] concerning the Global Settlement Agreement Negotiations.

4. Notes or records of telephone conversations [with external parties] concerning the Global Settlement Agreement Negotiations.

5. Agreements or documents with agreement terms … concerning the Global Settlement Agreement Negotiations.

6. Agreements or documents with agreement terms … exchanged [with external parties] concerning the Globals Settlement Agreement Negotiations.

7. Any documents … concerning A) the Encino CBA Negotiations; B) the Garden Grove CBA Negotiations; C) the Centinela Negotiations; D) the

DCHS Negotiations; and/or E) the Election Procedure Agreement Negotiations to the extent that these documents differ from documents concerning the Global Settlement Agreement Negotiations.

8. Correspondence … concerning A) the Encino CBA Negotiations; B) the Garden Grove CBA Negotiations; C) the Centinela Negotiations; D) the DCHS Negotiations; and/or E) the Election Procedure Agreement Negotiations to the extent that such correspondence differs from correspondence concerning the Global Settlement Agreement Negotiations.

9. Correspondence [with external parties] concerning A) the Encino CBA Negotiations; B) the Garden Grove CBA Negotiations; C) the Centinela Negotiations; D) the DCHS Negotiations; and/or E) the Election Procedure Agreement Negotiations to the extent that such correspondence differs from correspondence concerning the Global Settlement Agreement Negotiations.

10. Notes or records of telephone conversations [with external parties] … concerning A) the Encino CBA Negotiations; B) the Garden Grove CBA Negotiations; C) the Centinela Negotiations; D) the DCHS Negotiations; and/or E) the Election Procedure Agreement Negotiations to the extent that these documents differ from documents concerning the Global Settlement Agreement Negotiations.

11. Agreements or documents with agreement terms … concerning A) the Encino CBA Negotiations; B) the Garden Grove CBA Negotiations; C) the Centinela Negotiations; D) the DCHS Negotiations; and/or E) the Election Procedure Agreement Negotiations to the extent that these agreements or documents differ from agreements or documents concerning the Global Settlement Agreement Negotiations.

12. Agreements or documents with agreement terms … exchanged [with external parties] concerning A) the Encino CBA Negotiations; B) the Garden Grove CBA Negotiations; C) the Centinela Negotiations; D) the DCHS Negotiations; and/or E) the Election Procedure Agreement Negotiations to the extent that these agreements or documents differ from agreements or documents concerning the Global Settlement Agreement Negotiations.

Subpoena, Exh. A.

The Union would have the ALJ bury its head in the sand and ignore the overall context of the negotiations, which plainly has bearing on issues including but not limited to the parties' intent and knowledge. The ALJ should reconsider its Order and reject the Union's baseless

attempt to narrow and circumscribe the range of clearly relevant issues before the hearing and overrule the Union's objections.

D. The Union's Objections are Frivolous and Legally Baseless

1. The Union's General Objections are Meritless

The Union has objected to the subpoena on a variety of general grounds, ranging from the simply meritless to the utterly absurd. There is no reasoned basis for the Union's objections, and they should be ignored. Indeed, "[b]oilerplate objections that include unsubstantiated claims of undue burden, overbreadth and lack of relevancy while producing no documents . . . are a paradigm of discovery abuse." *Freydl v. Meringolo,* 09–CV–7196, 2011 WL 2566087, at *3 (S.D.N.Y. June 16, 2011) (quotations omitted). Respondents address each of these general objections, which should each be overruled, in turn below.

1. **A witness fee was not attached to the subpoena**. The Charging Party received the witness fee and mileage allowance in advance of the hearing. *See* Letter from Fitzsimmons to Harland, attached as Exhibit C. Accordingly, this objection is baseless and should be overruled.

2. **The subpoena is vague, overbroad, oppressive and burdensome**. The Subpoena seeks a narrowly tailored set of documents and communications unquestionably in the possession of the Union. The requests are specifically limited to the negotiations between the Respondents and the Union relating to the purported agreements in question. The definitions and instructions specifically give a time frame limitation for the negations at issue: "in and around October and November 2014," further negating the Union's charges of burdensomeness and overbreadth. *See* Subpoena, Definitions and Instructions G- I. Accordingly, this objection should be overruled.

3. **The subpoena calls for irrelevant and immaterial documentation that is not**

reasonably calculated to lead to the discovery of admissible evidence. As noted above, the Subpoena requests are unquestionably relevant to this matter. *See* section I.A, *supra*. Accordingly, this objection should be overruled.

4. **The subpoena calls for documents that are protected by the attorney-client privilege and/or attorney work product.** The subpoena expressly does not seek attorney-client privileged information. *See* Subpoena, Instruction Z. If the Union is withholding documents on this basis, it should prepare a log providing the factual details to substantiate its assertions of privilege. Accordingly, this objection should be overruled.

5. **The subpoena calls for documents protected by a mediation privilege.** There is no mediation privilege applicable to the Union in order to shield its materials from discovery. As is made clear from the caselaw cited by the Union in its specific objections, any such privilege in Board proceedings applies to protect the mediator from testifying or responding to discovery requests. . *See N.L.R.B. v Joseph Mancuso, Inc.*, 618 F.2d 51 (9th Cir. 1980). The privilege does not relieve parties to the mediation of their discovery obligations. Accordingly, this objection should be overruled.

6. **The subpoena calls for documents protected by a governmental privilege.** Apparently, the Union is so used to flexing its political muscles that it has convinced itself that it is a governmental entity. Despite these delusions, it is merely a private party and any governmental or deliberative process privilege that applies to the inner workings of governmental agencies has no applicability to documents in the possession, custody or control of the Union. *See Rodgers v. Hyatt*, 91 F.R.D. 399, 406 (D. Colo. 1980) (denying discovery of internal IRS documents); *U.S. v. Fairly*, 11 F.3d 1385, 1389 (7th Cir. 1993) (denying discovery of internal FTC memorandum). Accordingly, this objection should be overruled.

7. **The documents requested are equally available to the requesting party.** This

is not a proper basis for objection. The subpoena calls for materials in the possession, custody, or control of the Union. There is clear relevant evidentiary value to the Respondents in knowing what documents and materials are in the possession, custody or control of the Union. *See*, *e.g.*, *Ramsay v. G.C. Evans Sales and Mfg. Co.*, 196 B.R. 114 (E.D. Ark. 1996); *Cook v. Rockwell Int'l Corp.*, 161 F.R.D. 103 (D. Colo. 1995); *FDIC v. Renda*, 126 F.R.D. 70 (D. Kan. 1989).For the Union to deny this is disingenuous. Accordingly, this objection should be overruled.

8. **The subpoenas call for documents that deal with internal Union matters and are protected from disclosure by the National Labor Relations Act and the First Amendment of the United States Constitution**. It is unclear from its face what this objection refers to. If the Union can specifically and factually substantiate a claim that certain specified materials should receive protection under the privilege accorded to collective bargaining strategy under *Berbiglia*, it is can claim this privilege for those documents so that it can be evaluated by the ALJ and by Respondents. This is not a valid basis to completely disregard its obligations to reply to the Subpoena. Accordingly, this objection should be overruled.

9. **The subpoena calls for documents not in the possession, custody or control of [the] Union.** The instructions to the Subpoena expressly state that the requests cover "documents in the possession, custody, or control of the Union, its agents, affiliates and/or representatives." Subpoena, Instruction R. Accordingly, this objection should be overruled.

10. **The subpoena has been issued solely for the purpose to harass the Union.** The Union uses this objection as a kind of "catch-all" for objections already interposed and addressed, such as the Union's meritless claims that the Subpoena requests are irrelevant to the instant matter or that they call for bargaining strategy. Accordingly, this objection should be overruled.

11. **The subpoena has been issued for an improper purpose – namely in an effort**

to conduct discovery of issues relate to Respondents' RICO lawsuit. The Charging Party brought this charge to the Board. The Respondents are entitled under Board law to issue Subpoenas seeking relevant evidence to present its defense. As demonstrated above, the Subpoena requests are completely focused on the course of negotiations that the Union claims and that Respondents deny culminated in an enforceable agreement. The Union cannot skirt its obligation in this matter by claiming that the materials might also have some theoretical relevance to another matter, relevance that the Union does not even bother to explain.[3] Accordingly, this objection should be overruled.

2. The Union's Specific Objections are also Meritless

In addition to its general objections, the Union also objects to each Subpoena request on separate grounds. Like its general objections, these objections are baseless. Because there is significant repetitive overlap in the Union's specific objections, Respondents will only address each specific ground for objection once.

a. The Subpoena Requests are not Vague and Ambiguous (All Requests).

The Union objects to each of the Subpoena Requests on the grounds that each one is "vague and ambiguous as it does not describe with sufficient particularity and specificity the evidence whose production is sought." None of the Subpoena Requests however leave any questions as to the information that it seeks, both in type of document and the subject matter of the materials requested. Accordingly, this objection should be overruled.

b. The Subpoena Requests are not Overbroad and Burdensome (All Requests)

[3] The relevancy of information requested in this case is not determined by whether its production would affect other litigation. "[W]here the discovery sought is relevant to a good faith defense . . . the mere fact that it may be used in other litigation" does not mean that it may be withheld from production. *Dove v. Atlantic Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992) (citation omitted))

The Union objects to all of the requests that they are overbroad and burdensome. Contrary to the Union's assertions, the Subpoena Requests are focused as to both subject matter and time frame. Each and every one of the Subpoena requests are narrowly tailored to seek documents concerning the Global Settlement Negotiations at issue in this case or the negotiations for the individual agreements that were a part of the Global Settlement Negotiations. The time frame is explicitly limited in each of the definitions to the Negotiations as "in and around October and November 2014." *See* Subpoena, Definitions and Instructions G- I. Accordingly, this objection should be overruled.

c. <u>All of the Subpoena Requests are Plainly Relevant (Requests 3, 4, 6, 9, 10, 12)</u>

For the reasons discussed in Section 1.A, *supra*, the Subpoena Requests are all unquestionably relevant to this matter. The Union objects to the certain of the Subpoena Requests that seek correspondence and documents between the Union and non-Union personnel concerning the negotiations. Correspondence, documents and agreements exchanged between the Union and other parties, including Prime, are absolutely relevant on any number of issues such as the intent and the knowledge of the Union relating to the purported agreements. Accordingly, this objection should be overruled.

d. <u>That the Documents may Equally Available to Respondents is not a Valid Basis for Objection (All Requests)</u>

The Union has also objected to each of the Subpoena Requests on the basis that the documents requested may be Equally Available to Respondents. This is not a proper basis for objection. The subpoena calls for materials in the possession, custody, or control of the Union. There is clear evidentiary value to the Respondents in knowing what documents and materials are in the possession, custody or control of the Union. For the Union to deny this is disingenuous. Accordingly, this objection should be overruled.

e. The Subpoena does not call for Documents Covered by the Attorney-Client Privilege (all requests)

The Union objects to each of the Subpoena requests as requesting material covered by the attorney-client privilege. The subpoena expressly does not seek attorney-client privileged information. *See* Subpoena, Instruction Z Under the Board's rules, where a party plans to assert a claim of privilege, the party must expressly make the claim and prepare a privilege log that includes: "(1) a description of the document, including its subject matter and the purpose for which it was created; (2) the date the document was created; (3) the name and job title of the author of the document; and (4) if applicable, the name and job title of the recipient(s) of the document." NLRB Division of Judges Bench Book § 8-405 (2010) (quotations and citations omitted). Accordingly, this objection should be overruled.

f. The Union has not Shown that the Collective Bargaining Privilege Applies (All Requests)

The Union objects to each of the Subpoena requests as requesting material covered by the privilege protecting collective bargaining strategy. If the Union can specifically and factually substantiate a claim that certain materials should receive protection under the privilege accorded to collective bargaining strategy under *Berbiglia*, 233 N.L.R.B. 1476, 1495 (1977), it can claim this privilege for those documents so that it can be evaluated by the Board and by Respondents. This is not a valid basis to completely disregard its obligations to reply to the Subpoena. Accordingly, this objection should be overruled.

g. The Union has not shown that the Subpoena requests Communications with Employees (All Requests)

The Union objects to each of the requests that they encompass Union to employee communications that may violate Section 8(a)(1) of the Act. The Union's apparent concern is that the Request may lead to documents containing the names of its members. With regard to

member and membership information, the Board has previously held that, although there may be some privacy concerns implicated where the identity of union members is sought, such concerns will not prevent disclosure of the requested information when they are outweighed by a party's legitimate need to protect or assert its rights during a proceeding before the Board. *See Raymond Max Snyder*, 313 N.L.R.B. 215, 218 (1983) (granting employee's request to be provided with union referral list over privacy objections in order to protect his referral rights during Board proceeding); *see also*, *Rust Engineering*, 276 N.L.R.B. 898 (1985); *NLRB v. Carpenters Local 608*, 811 F.2d 149 (2d Cir. 1987) (Board's Order upheld permitting copying of addresses and telephone numbers from hiring hall records). Accordingly, this objection should be overruled.

h. The Requests do not Seek Confidential Commercial Information (All Requests)

The Union also objects to each of the Subpoena requests on the grounds that they require the production of "trade secret or other confidential research, development, or commercial information" as set forth in Federal Rules of Civil Procedure 26(c)(1)(G). The Union goes on to say that the confidential "commercial information" that this objection refers to is its "collective bargaining strategy." While it is unlikely that the Union's "collective bargaining strategy" is the kind of confidential/trade secret information covered by FRCP 26(c)(1)(G), the Union's claim of protection for its collective bargaining strategy for any such document should be evaluated as set forth in Section I.C.3.f, *supra*. If the Union can specifically and factually substantiate a claim that certain materials should receive protection under the privilege accorded to collective bargaining strategy under *Berbiglia*, 233 N.L.R.B. 1476, 1495 (1977), it can claim this privilege for those documents so that it can be evaluated by the Board and by Respondents. This is not a valid basis to completely disregard its obligations to reply to the Subpoena. Accordingly, this objection should be overruled.

i. The Deliberative Process Privilege Does Not Apply to the Union (All Requests)

The Union objects to each of the Subpoena requests as requesting material covered by the deliberative process privilege. This objection is absurd on its face. As clearly set forth in the cases cited by the Union, the Deliberative Process privilege is available to government officials and entities, not private entities like the Union. *See Rodgers v. Hyatt*, 91 F.R.D. 399, 406 (D. Colo. 1980) (denying discovery of internal IRS documents); *U.S. v. Fairly*, 11 F.3d 1385, 1389 (7th Cir. 1993) (denying discovery of internal FTC memorandum). Accordingly, this objection is baseless and should be overruled.

j. Any Mediation Privilege Does Not Apply to the Union (All Requests)

Similarly, the Union seeks refuge in a mediator privilege, objecting to each of the Subpoena requests on that basis. However, he case cited by the Union in its Petition to Revoke, the mediator privilege as recognized by the Board serves only to prevent the mediator to be called to testify concerning a matter that he mediated. *See N.L.R.B. v Joseph Mancuso, Inc.*, 618 F.2d 51 (9th Cir. 1980)

III. CONCLUSION

For the foregoing reasons, the Board should reconsider the Order Granting Charging Party's Petition to Revoke Subpoena Duces Tecum B-1-M9QMXJ. Further, each of the Union's objections to the Subpoena should be overruled and the Union's Petition to Revoke should be denied. The Union should be ordered to comply with Subpoena Duces Tecum B-1-M9QMXJ in full.

Respectfully Submitted,

/s/ John Fitzsimmons_____
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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of September, 2015, a copy of the foregoing Respondents' Motion for Reconsideration was filed electronically and copies were sent via e-mail to the following:

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